United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2255

UNITED STATES COURT OF APPEALS

For the Second Circuit

In the Matter of the Arbitration between INTSEL CORPORATION,

Petitioner-Appellee,

-against-

M. W. ZACK METAL COMPANY,

Respondent-Appellant.

On Appeal From The United States District Court
For The Southern District of
New York

APPELLEE'S BRIEF

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Section 12. APPOINTMENT FROM PANEL - If the parties have not appointed an Arbitrator and have not provided any other method of appointment, the Arbitrator shall be appointed in the following manner: Immediately after the filing of the Demand or Submission, the AAA shall submit simultaneously to each party to the dispute an identical list of names of persons chosen from the Panel. Each party to the dispute shall have seven days from the mailing date in which to cross off any names to which he objects, number the remaining names indicating the order of his preference, and return the list to the AAA. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an Arbitrator to serve. If the parties fail to agree upon any of the persons named, or if acceptable Arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from other members of the Panel without the submission of any additional lists.

Section 22. STENOGRAPHIC RECORD - The AAA shall make the necessary arrangements for the taking of a stenographic record whenever such record is requested by a party. The requesting party or parties shall pay the cost of such record as provided in Section 49.

Section 30. EVIDENCE - The parties may offer such evidence as they desire and shall produce such additional evidence as the Arbitrator may deem necessary to an understanding and determination of the dispute. When the Arbitrator is authorized by law to subpoena witnesses or documents, he may do so upon his own initiative or upon the request of any party. The Arbitrator shall be the judge of the relevancy and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the Arbitrators and of all the parties, except where any of the parties is absent in default or has waived his right to be present.

Section 42. SCOPE OF AWARD - The Arbitrator may grant any remedy or relief which he deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract. The Arbitrator, in his award, shall assess arbitration fees and expenses in favor of any party and, in the event any administrative fees or expenses are due the AAA, in favor of the AAA.

ISSUES PRESENTED FOR REVIEW

1. Where contracts of sale provide for arbitration of any controversy arising under or relating to the contracts or any modification thereof, and the parties thereto proceed to arbitration before an arbitrator duly selected pursuant to the Rules of the American Arbitration Association, and the arbitrator's award could rationally have been based on the contracts presented to him, did the arbitrator exceed his powers within the meaning of 9 U.S.C. §10(d) in that he apparently resolved issues of fact in favor of the successful party?

2. Did the District Court err in confirming an arbitration award where the arbitrator conducted a hearing pursuant to the rules of the American Arbitration Association, at which both parties were accorded the opportunity to present evidence and argument, and rendered an award precisely based upon the quantity of goods actually shipped pursuant to the contracts, and where his conduct of the hearing was wholly consistent with the standard of informality and expedition appropriate to arbitration proceedings?

3. Was an arbitration award procured by corruption, fraud or undue means within the meaning of 9 U.S.C.

§10(a) where the arbitrator was duly selected pursuant to the Rules of the American Arbitration Association to which the parties had bound themselves in their agreement?

4. Where there is no showing that an arbitrator has refused to admit any material evidence, did the District Court err in not finding him guilty of misconduct within the meaning of 9 U.S.C. §10(c) because he admitted documentary evidence allegedly not admissible in a court of law, or because he participated in the questioning of witnesses?

5. Did the District Court err in confirming an arbitration award where no showing was made of the existence of any of the grounds for vacating or modifying an award listed in 9 U.S.C. §§10 and 11?

STATEMENT OF THE CASE

Respondent-Appellant, M. W. Zack Metal Company (hereinafter referred to as "Zack") appeals herein from a decision and order of the United States District Court for the Southern District of New York (Murray I. Gurfein, J.), and from the judgment entered thereon, which granted the application of Petitioner-Appellee Intsel Corporation (hereinafter referred to as "Intsel") for confirmation of an arbitration award and denied Zack's motion to vacate said award.

Intsel commenced this proceeding pursuant to 9 U.S.C. §9 by the filing and service of its Notice of Application and Petition to confirm an arbitration award duly rendered pursuant to the Rules of the American Arbitration Association (hereinafter referred to as "the AAA") (A. 1-9). Federal jurisdiction was based upon the provisions of the arbitration agreement between the parties and their diversity of citizenship. Zack opposed the application and moved to dismiss the petition, claiming lack of jurisdiction, improper venue, insufficiency of process and failure to state a claim upon which relief could be granted; it also moved to vacate the award on the ground that the award was procured by corruption, fraud, or undue means, that the arbitrator was guilty of misconduct and that the arbitrator had exceeded his powers (A. 10-11).

The District Court (Gurfein, J.) rendered its opinion and order confirming the arbitration award and denying Zack's motion in all respects, and judgment has been entered upon said order. Zack's motion for reargument was granted by Judge Gurfein and, upon reconsideration, the Court adhered to its original decision (A. ii).

The objections to jurisdiction and venue, which Zack asserted in the District Court, and which were rejected, have not been pressed on this appeal.

STATEMENT OF FACTS

During 1969, Intsel, a New York corporation with its principal place of business in New York City, and Zack, a Michigan corporation with its principal place of business in Michigan, entered into two agreements, Intsel's contract numbers 50240 (A. 7-7a) and 50617 (8-8a), for the sale of certain aluminum tubing and rods by Intsel to Zack. Each agreement, and each subsequent amendment thereof, was confirmed by Intsel's written contract which contained the following identical clause:

> "Any controversy arising under or in relation to the contract or any modification thereof shall be settled by arbitration in the City of New York in accordance with the Arbitration Laws of the State of New York and the Rules then obtaining of the American Arbitration Association, and judgment on this award may be entered in any court, State or Federal, having jurisdiction." (A. 7a, 8a)

Contract 50240 was originally made pursuant to Zack's purchase order 3908 dated January 7, 1969 (A. 76-76a) and Intsel's sales contract 50240 dated January 13, 1969

(A. 7-7a) and provided for the sale of 40,000 pounds of aluminum hollow bar (tubing) at $.503 per pound. It was subsequently amended, however, pursuant to Zack's written request dated June 18, 1969 (A. 50) and Intsel's "Change Order IV" dated June 23, 1969 (A. 51) to cover 55,000 pounds, of somewhat different specifications (A. 64-66).

Contract 50617 was originally made pursuant to Zack's purchase order 3917 dated July 29, 1969 (A. 52), as amended as to price by Zack's letter dated August 5, 1969 (A. 77), and Intsel's contract 50617 dated August 7, 1969 (A. 8-8a). It provided for the sale of 10,000 pounds of aluminum round rods at $.462 (changed to $.464) per pound. It was subsequently amended pursuant to Intsel's "Change Order I" dated September 9, 1969 (A. 78) which modified the specifications but left all other terms and conditions unchanged (A. 66-67).

Delivery was made of 60,553 pounds under contract 50240 and 10,335 pounds under contract 50617 (A. 68-69). Zack accepted and retained the goods (A. 68).

A controversy having arisen under the contracts, as amended, Intsel duly served Zack with a written Demand for Arbitration dated April 12, 1973 (A. 70), setting forth

the nature and amount of the claim and containing the following notice:

> "PLEASE TAKE FURTHER NOTICE, that unless within ten days after service of this Notice of Intention to Arbitrate, you apply to stay the arbitration herein, you shall thereafter be precluded from objecting that a valid agreement was not made or has not been complied with and from asserting in court the bar of a limitation of time."

Zack did not apply to stay the arbitration, but promptly appeared in the arbitration proceeding by its counsel (A. 59, 71). A proposed list of arbitrators was sent to both counsel by the AAA (A. 72-72a), but Zack failed to designate its choices for arbitrator, even though given additional time to do so by the AAA (A. 59-60, 74). Consequently, after due notice to both parties, the AAA selected an arbitrator from the list returned by Intsel (60, 75). The arbitrator thus chosen, Mark A. Buckstein, Esq., was Intsel's fifth choice out of six proposed arbitrators (59, 73).

Zack's New York counsel appeared before the arbitrator prior to the hearing date, but raised no objection to Mr. Buckstein's service (A. 60). Thereafter, a hearing was held, at which both Zack and Intsel were represented by counsel and presented witnesses and documentary evidence (A. 61-63).

No stenographic record was made of the hearing nor did Zack request that one be made pursuant to the rules of the AAA (A. 61).

At the hearing, Zack argued, among other things, that one or both contracts had been "superseded" by their written amendments, that the contracts had been orally "cancelled" at the time of delivery and that Zack had accepted delivery "on Intsel's account." (A. 46) Zack's factual assertions were vigorously disputed by Intsel and were contradicted by documentary evidence (A. 68) (Zack's repeated assertions that its version of the facts was "conceded," "admitted," "not denied" or "not in dispute" before the arbitrator are incorrect).

Although not required by the Rules of the AAA to follow any particular procedure, the arbitrator permitted both parties to present all their witnesses and to cross-examine those of the other side, permitted opening addresses and closing summations by counsel and occasionally questioned the witnesses himself for clarification (A. 63). Thereafter, he made his award in writing (A. 9), directing Zack to pay to Intsel $35,253.60, together with interest thereon at the rate of 6% from January 1, 1970 to the date of payment and,

in addition, $702.53 for fees previously advanced by Intsel to the AAA. The award also denied all counterclaims of Zack (A. 4-5, 9).

POINT I

THE ARBITRATION AWARD MUST BE CONFIRMED UNLESS THE PARTY ATTACKING IT SUSTAINS ITS BURDEN OF PROVING ONE OF THE DEFECTS SPECIFIED IN 9 U.S.C. §§10 AND 11.

Section 9 of the Arbitration Act, 9 U.S.C. §9, provides for the application to the appropriate United States District Court for an order confirming an arbitration award where, as here, the agreement between the parties authorizes the entry of judgment on the award and the application is made within one year after the award. It then provides that upon such application, "the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in Sections 10 and 11 of this title." (Emphasis supplied).

As this Court said in Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp., 274 F.2d 805 (2d Cir. 1960) at page 808:

> "The court's function in confirming or vacating an arbitration award is severely limited. If it were otherwise, the ostensible purpose for resort to arbitration, i.e., avoidance of litigation, would be frustrated. See Note, Judicial Review of Arbitration Awards on the Merits, 63 Harv. L. Rev. 681 (1950). The statutory provisions, 9 U.S.C. §§10, 11, in expressly stating certain grounds for either vacating an award or modifying or correcting it, do not authorize its setting aside on the grounds of erroneous finding of fact or of misinterpretation of law."

Thus an arbitration award should be upset by the courts only with great hesitation. Karppinen v. Karl Kiefer Machine Co., 187 F.2d 32, 34 (2d Cir. 1971). As the merits of the controversy submitted to arbitration cannot be reopened before the court, the role of the courts "is limited to ascertaining whether there exists one of the specific grounds for the vacation of an award, provided in §10 of the Arbitration Act...." Saxis Steamship Co. v. Multifacs International Traders, Inc., 375 F.2d 577, 581 (2d Cir. 1967); Catz American Co. v. Pearl Grange Fruit Exchange, Inc., 292 F.Supp. 549, 551 (S.D.N.Y. 1968).

As Judge Weinfeld said in Oinoussian Steamship Corp. of Panama v. Sabre Shipping Corp., 224 F.Supp. 807 (S.D.N.Y. 1963) at page 809, cited by Judge Gurfein in his opinion below (A. 110, 111):

> ". . . there is as little justification for inquiry into the factual basis upon which the arbitrators reached their judgment as there is for inquiry into the basis upon which a jury determination rests. An award within the scope of the submission is conclusive on fact issues and interpretation of law."

The burden of proof on the issue of whether partiality or some other defect specified in §10 or §11 of the Act was present during the arbitration is upon the party making such an allegation. See Saxis Steamship Co. v. Multifacs International Traders, Inc., supra, at 582. With respect to each of the items listed in §10 and §11, Judge Gurfein found that Zack had failed to sustain this burden, and the arguments Zack presses on this appeal only confirm the correctness of Judge Gurfein's conclusions.

POINT II

THE ARBITRATOR DID NOT EXCEED HIS POWERS IN AWARDING RECOVERY TO INTSEL ON THE CONTRACTS

To the extent its position can be discerned from its somewhat inconsistent brief, Zack seems to argue (Zack brief, 12-22) that the arbitrator did not properly apply the laws of New York to the case, and thereby exceeded his

powers in that (1) he allegedly based his award on contracts which Zack claimed had been terminated and replaced by others, and (2) he apparently did not accept Zack's contention that the written agreements had been orally cancelled (An additional argument based on the Statute of Frauds, which was made by Zack in the District Court and rejected by Judge Gurfein (A.111), has not been asserted on this appeal).

A. THE ARBITRATION AWARD MAY NOT BE ATTACKED BY REASON OF THE ARBITRATOR'S ALLEGED ERRORS OF LAW OR FACT

As Judge Gurfein correctly recognized (A.8), it is not the Court's function to review the factual and legal determinations of the arbitrator. Section 42 of the Commercial Arbitration Rules of the AAA, to which the parties bound themselves, provides that the arbitrator "may grant any remedy or relief which he he deems just and equitable and within the scope of the agreement of the parties . . ." (Emphasis supplied). He need not give the reasons for his decision. Bernhardt v. Polygraph Co.of America, 350 U.S. 198, 203 (1956); Wilko v. Swan, 346 U.S. 427, 436 (1953); Sobel v. Hertz, Warner & Co., 469 F.2d 1211, 1215 (2d Cir. 1972). His award is thus insulated from attack by

the courts for erroneous findings of fact or misinterpretations of law. Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp., supra, 274 F.2d at 808; Oinoussian Steamship Corp. of Panama v. Sabre Shipping Corp., supra, 224 F.Supp. at 807. It is irrelevant to consider whether a court of law would enforce the claims of either party. Matter of Exercycle Corp. (Maratta), 9 N.Y.2d 329, 337 (1961).

To show "Manifest disregard" of the law by the arbitrator sufficient to challenge the award, the respondent must prove "something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law." Saxis Steamship Co. v. Multifacs International Traders, Inc., supra, 375 F.2d at 582. Any such exception must be severely limited, because extensive judicial review frustrates the basic purpose of arbitration, which is to dispose of disputes quickly and avoid the expense and delay of extended court proceedings. Ibid.

Zack's reliance on Wilko v. Swan, 346 U.S. 427 (1953) is entirely misplaced. That decision was based on the statutory language and purposes of the Securities Act.

The agreement to arbitrate was not enforced precisely because interpretations of the law by arbitrators are not subject to judicial review, and an investor's agreement to arbitrate would constitute a waiver of the access to the federal courts the Act intended he should have. It was the very existence of the general rule insulating an arbitrator's decision from review that prompted the Supreme Court to except cases arising under the Securities Act.

Nor can the various United Steelworkers cases it cites give Zack any comfort. Indeed, the context of the passage Zack flagrantly misquotes at the bottom of page 13 of its brief only reaffirms the principle that "whether the moving party is right or wrong is a question of contract interpretation for the arbitrator." United Steelworkers v. American Mfg. Co., 363 U.S. 564, 568 (1960).

Nor does the Court's decision in Swift Industries, Inc. v. Botany Industries, Inc., 466 F.2d 1125 (3d Cir. 1972) support Zack's position. That decision, citing the New York Court of Appeals, stated as the applicable rule of law that "an award of an arbitrator is not subject to judicial revision unless it is 'completely irrational.'" 466 F.2d at 1131. See also, Lentine v. Fundaro, 29 N.Y.2d

382, 385-86 (1972); Matter of National Cash Register Co. (Wilson), 8 N.Y.2d 377, 383 (1960).

Zack has failed to make such a showing in the case at bar. At most, his quarrel with the award is only on matters of disputed facts, credibility and contract interpretation.

B. THE ISSUES OF FACT AS TO WHETHER THE CONTRACTS WERE CANCELLED, MODIFIED OR REPLACED WERE FOR THE ARBITRATOR TO DETERMINE

Zack suggests that the arbitrator "exceeded his authority" by awarding Intsel recovery on contracts 50240 and 50617, as amended, on the grounds (1) that contract 50240 had allegedly been "superseded" on or about June 23, 1969 (Zack brief, 20-22) and (2) that Zack had presented testimony at the hearing that the written contracts had been orally "rescinded" and replaced by a new agreement (Zack brief, 18-20). That the legal and factual issues raised by these assertions were clearly within the scope of the arbitrator's power to determine can be seen by referring to the arbitration agreement between the parties, originally contained in the contracts of January 13, 1969 (A.7a) and August 7, 1969 (A.8a) and which was repeated on all subsequent "change order" forms reflecting modifications of the contracts:

> "Any controversy arising under or in relation to this contract or any modification thereof shall be settled by arbitration . . . in accordance with the Arbitration Laws of the State of New York and the Rules then obtaining of the American Arbitration Association . . ." (Emphasis supplied)

Under New York Law, it is clear that arbitration may be had as to all issues arising subsequent to the making of the contract, including the termination thereof, and that the issue of termination is for the arbitrators to decide. Matter of Terminal Auxiliar Maritima S.A. (Winkler Credit Corporation), 6 N.Y.2d 294, 298 (1959); Matter of Lipman (Haeuser Shellac Co.), 289 N.Y. 76, 80 (1942). See also Eastern Marine Corp. v. Fukaya Trading Co., 364 F.2d 80, 85 (5th Cir. 1966). The factual and legal contentions asserted herein by Zack were presented at great length to the arbitrator (A.29, 40, 45, 47) and after due consideration he made his award based on the written contracts as amended and the quantity of goods actually delivered, an award obviously within his power.

Zack repeatedly, and incorrectly, argues that its evidence at the hearing of an oral cancellation of the contracts was "undisputed" or "conceded". On the contrary, Intsel vigorously opposed those allegations and the documentary

evidence submitted on both sides tended to refute them (A.68). Of course, those issues of fact were for the arbitrator and from his decision, we can assume he determined them adversely to Zack. Introduction of all this evidence and repetition of the oral testimony by affidavit in the District Court is improper and meaningless. The trier of fact in this case was the arbitrator and the correctness of his factual decisions are not properly before the Court.

If we understand Zack correctly, it is arguing that the arbitrator "disregarded the law" because in his award he referred to Intsel's original contracts dated January 13, 1969 (#50240) (A.7-7a) and August 7, 1969 (#50617) (A.8-8a) (Zack brief, 22). These contracts were subsequently amended and a complete list of the documents comprising the two contracts, as amended, appears in the record (A.64-67). At the hearing, Zack argued that as to #50240, only the amendment of June, 1969 (A.50, 51) was the contract, having replaced the original contract of January 13, 1969 (A.7-7a). This was vigorously disputed before the arbitrator and is contradicted by the very language of the June purchase order and "Change Order", which by their terms simply modify the January Agreement.

The most peculiar aspect of Zack's argument as to what the true contracts were is that even if its position in this regard were to be accepted, Intsel's claim would nevertheless be precisely the same and the amount of the award would also be the same. There is no disagreement that whether amended or replaced, the eventual contract #50240 was for 55,000 pounds of hollow bar (A.51) at $.503 per pound (A.7) and the eventual contract #50617 was for 10,000 pounds of round rods at $.464 per pound (A.8). Since Intsel's confirmations with respect to both contracts contain the arbitration clause and neither side has ever questioned their authenticity, it is difficult to imagine what difference it could make whether the June documents were amendments of an earlier contract or new contracts. Since the matters submitted were contracts 50240 and 50617 in their entirety (A.[illegible]), this distinction without a difference could not affect the merits of the decision. In any event, as Judge Gurfein noted (A.113), the arbitrator did not purport to make his award only on the original contracts, but simply referred to them as the earliest documents containing the arbitration agreement (A.9).

C. THE ARBITRATOR CALCULATED DAMAGES CORRECTLY

Zack's argument (Zack brief, 25) that the damages

in the award were computed incorrectly is self-contradictory and insupportable. Zack itself concedes that contract 50240, as amended or "superseded", was for 55,000 pounds and contract 50617 was for 10,000 pounds (Zack brief, 5). At the hearing, evidence was presented to indicate that the pounds shipped slightly exceeded the pounds ordered, that Zack had approved these overages and that the invoice prices were based on the number of pounds actually shipped, accepted and retained by Zack (A.68). The amount of $35,253.60 is derived by simply multiplying the number of pounds actually shipped times the price per pound specified in the contracts (A.68-69). There was no miscalculation or other mistake in the award. 9 U.S.C. §11(a).

POINT III

THERE IS NO SHOWING OF MISCONDUCT BY THE ARBITRATOR DURING THE HEARING

Zack argues that the arbitrator misbehaved and displayed his alleged bias (1) by admitting documentary evidence which, in the view of Zack's attorney, would not have been admissible in a court of law (Zack brief, 27) and (2) by allegedly "badgering" one of the witnesses, a Mr. Krasnov (Zack brief, 28-30). This argument displays a

complete lack of understanding of the arbitration process.

Section 10(c) of the Arbitration Act, 9 U.S.C. §10(c), does not permit an arbitration award to be vacated on the ground that the arbitrator admitted too much evidence. It only permits an aggrieved party to show, if he can, that the arbitrator refused to hear material and relevant evidence. Section 30 of the Commercial Arbitration Rules of the AAA provides in part as follows:

> "The Arbitrator shall be the judge of the relevance and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary."

In arbitration, the technical rules of evidence simply do not apply and Zack's objection on this ground is, in this context, frivolous. See Burchell v. Marsh, 58 U.S. (17 Howard) 344, 352 (1854); Fudickar v. Guardian Mutual Life Ins. Co., 62 N.Y. 392, 400 (1975). In any event, the record indicates that the documents upon which Zack's factual and legal position were based were in fact admitted into evidence and were before the arbitrator (A.64-67). As Zack's papers themselves confirm, its attorney was given the opportunity to make before the arbitrator the arguments which it now repeats in this proceeding (A.21, 29, 45, 46, 47). The fact that the arbitrator apparently did not accept

Mr. Cataldo's legal conclusions can under no circumstances be labelled "misconduct" sufficient to vacate the award.

As for the alleged "badgering" of Mr. Krasnov, Zack's principal objection appears to be the arbitrator's participation in the questioning of the witness, which allegedly so angered Mr. Krasnov that he left the hearing room. However, Zack's own affidavits (A.19) show that the arbitrator had simply questioned Mr. Krasnov about "Clause 3" on the back of the sales confirmations, which provided that Intsel would not be liable for any delay in delivery due to causes beyond its control (A.7a, 8a). Since this clause was of central importance to the issues in the arbitration, it was clearly a legitimate area of inquiry by the arbitrator, no matter how embarrassing it might be to the witness who had given it no previous consideration.

As this Court said in Ballantine Books, Inc. v. Capital Distributing Co., 302 F.2d 17 (2d Cir. 1962) at page 21:

> "[The arbitrator's] conduct of the hearing was wholly consistent with those standards of informality and expedition appropriate to arbitration proceedings. Indeed, we doubt that there would be any reason for questioning his actions had he been the judge at a trial in a district court. A judge is not wholly at the mercy of counsel, and would be remiss if he did not participate in questioning to

> speed proceedings and eliminate irrelevancies. E.g., Peckham v. Ronrico Corp., 288 F.2d 841 (1 cir., 1961). A fortiori an arbitrator should act affirmatively to simplify and expedite the proceedings before him, since among the virtues of arbitration which presumably have moved the parties to agree upon it are speed and informality."

As Judge Gurfein concluded (A.113-114), Zack's own description of Mr. Krasnov's departure from the hearing shows that it was prompted by the penetrating questions of the arbitrator, which were touching on a weak portion of the witness' testimony. In any event, Mr. Krasnov's affidavit itself specifically contradicts Zack's contention that because of his departure he did not have the opportunity to testify that "time was of the essence" and that Zack was buying for resale to a government contractor. Mr. Krasnov states in his affidavit that he had so testified (A.30).

POINT IV

THE SELECTION OF THE ARBITRATOR WAS PROPER

Zack alleges no specific fraud or corruption per se in the conduct of the arbitration; in support of its allegations of partiality and bias, however, it does claim that it was denied an opportunity to pick an arbitrator "of

its own" and that the arbitrator was picked only by "one side" (Zack brief, 26-27). As clearly disclosed by the events leading up to the selection of the arbitrator and the hearing itself (A.57-61), Zack was given every opportunity to participate in the selection of an arbitrator pursuant to the rules of the AAA to which the parties had bound themselves.

Section 12 of the Commercial Arbitration Rules of the AAA provides as follows:

> "If the parties have not appointed an Arbitrator and have not provided any other method of appointment, the Arbitrator shall be appointed in the following manner: Immediately after the filing of the Demand or Submission, the AAA shall submit simultaneously to each party to the dispute an identical list of names of persons chosen from the Panel. Each party to the dispute shall have seven days from the mailing date in which to cross off any names to which he objects, number the remaining names indicating the order of his preference, and return the list to the AAA. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an Arbitrator to serve. If the parties fail to agree upon any of the persons named, or if acceptable Arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from other members of the Panel without submission of any additional lists." (Emphasis supplied)

After having been duly notified of Intsel's demand for arbitration (A.70) and having promptly appeared in the proceeding by its attorney (A.71), Zack was given every opportunity by the AAA to designate its choices of arbitrators pursuant to this Rule (A.72-72a, 74) and failed to do so (A.60). Consequently, the Association appointed an arbitrator from the list as it had been returned by Intsel (A.75). It is interesting to note that the arbitrator selected, Mark A. Buckstein, was Intsel's fifth choice out of six possible names (A.59-60, 73).

Zack's claim that the arbitrator was "one picked by the petitioner" thus has no substance whatsoever. Zack took no steps to obtain a court order disqualifying the arbitrator and, in fact, prior to the hearing its counsel appeared before Mr. Buckstein to request a postponement and made no objection to Mr. Buckstein serving as arbitrator (A.60). He objected to Mr. Buckstein for the first time on the day of the hearing (A.60-61) and thereupon proceeded to participate therein.

As Judge Gurfein held (A.109), the selection of the arbitrator was made pursuant to the Rules of the AAA, to which the parties had bound themselves, and was in all respects fair and proper.

POINT V

THERE IS NO EVIDENCE OF PARTIALITY OR CORRUPTION IN THE ARBITRATOR

Zack argues that this Court should infer bias, prejudice and partiality on the part of the arbitrator from the manner of his selection, his deportment during the hearing and his ultimate decision adverse to Zack. As demonstrated supra, the procedure by which Mr. Buckstein was selected was proper, there is no showing that his handling of the hearing was in any way unfair to Zack, and his ultimate decision could rationally have been based on the contracts submitted to him.

Section 22 of the Commercial Arbitration Rules of the AAA provide, in part, as follows:

> "The AAA shall make the necessary arrangements for the taking of a stenographic record whenever such record is requested by a party." (Emphasis supplied)

No stenographic record was made of the arbitration hearing between the parties hereto, nor did Zack request that it be made (A.61). Having failed to provide for such a transcript, it cannot now attack the award on the basis of the arbitrator's "stern voice", "sly smile" and other such inconclusive alleged impressions. Whatever factual assertions

are made in the record do not even remotely sustain Zack's burden of showing that the arbitrator's conduct was so biased and prejudiced as to destroy fundamental fairness. See Catz American Co. v. Pearl Grange Fruit Exchange, supra, 292 F.Supp. at 551-52. As Judge Mansfield said in the Catz case at page 552:

> "Since no record was made of the arbitration proceeding, Pearl's claim of bias rests upon the affidavits of its President and counsel, containing conclusions and characterizations of the type frequently voiced by disappointed litigants, which are sharply controverted by opposing affidavits filed on behalf of Catz. Such meager, conflicting, and inconclusive record, which of necessity results from the very informality inherent in arbitration proceedings, illustrates why the Court must be reluctant to vacate an award in the absence of clear and convincing evidence."

Zack's charges of partiality are as insubstantial as its allegations that the arbitrator exceeded his powers, handled the admission of evidence improperly or miscalculated the amount of the award. This is not a case like Hyman v. Pottberg's Executors, 101 F.2d 262 (2d Cir. 1939), in which the arbitrators were also representatives of competing claimants to a common fund, thus suggesting on its face the possibility of partiality, and where a trial was ordered as to that issue only. Nor is it similar to Campbell v. American Fabrics Co., 168 F.2d 959 (2d Cir. 1948), where

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